BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JEANETTE K. JORDAN-CAIN	)	
Claimant	)	
V.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. 1,058,565
	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appealed the September 10, 2015, Award entered by Administrative Law Judge (ALJ) Rebecca A. Sanders. The Board heard oral argument on January 14, 2016.

APPEARANCES

John M. Ostrowski of Topeka, Kansas, appeared for claimant. Mark A. Buck of Lawrence, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, respondent stipulated claimant has a compensable 90 percent left upper extremity functional impairment for her July 19, 2011, work accident. Claimant agreed that the issue she raised concerning temporary total disability (TTD) benefits is moot if the Board affirms the ALJ's finding that she is permanently and totally disabled.

ISSUES

Highly summarized, the ALJ determined:

- based on Dr. Koprivica's testimony, claimant had a 59% whole body functional impairment involving her nearly useless left upper extremity on account of Complex Regional Pain Syndrome (CRPS), as well as right carpal tunnel syndrome and

right shoulder impairment, which were the direct and natural result of claimant overusing her right arm to compensate for her left arm injury;

- claimant's accident was the prevailing factor in her sustaining a new and different depressive disorder due to her work accident;

- claimant was permanently and totally disabled due to her injuries;

- claimant was not entitled to TTD benefits because she chose to retire when accommodated work was available;

- respondent did not prove entitlement to offsets based on KPERS or Social Security; and

- claimant was entitled to future medical treatment for her physical and psychological conditions.

Respondent contends: (1) claimant's psychological condition did not arise out of and in the course of her employment; (2) the psychologists who testified are not medical doctors and, therefore, are not qualified to render causation, prevailing factor or functional impairment opinions; (3) claimant's right upper extremity conditions are not the natural and probable consequence of her left upper extremity injury; (4) claimant is not permanently and totally disabled; (5) claimant voluntarily retired; (6) claimant is not entitled to future medical benefits for her psychological and right upper extremity conditions and (7) respondent is entitled to an offset for retirement benefits. Respondent requests the Board find claimant's entitlement to disability compensation and future medical treatment should be limited to her left upper extremity condition and the claim should be remanded to the ALJ to determine the amount of the offset.

Claimant asserts: (1) the ALJ properly found claimant's recurrent, severe major depression is directly attributable to the injury and its sequela; (2) the ALJ properly rejected the testimony of Patrick D. Caffrey, Ph.D., with regard to prevailing factor; (3) the ALJ missed commenting on the testimony of Andrew H. Schauer, Ph.D.; (4) the ALJ properly found the injuries to claimant's right upper extremity to be an overuse syndrome; (5) claimant did not voluntarily resign; (6) claimant is entitled to TTD benefits if the Board does not affirm the ALJ's finding that claimant is permanently and totally disabled; (7) respondent is not entitled to a retirement benefits offset; and (8) claimant is entitled to attorney fees.

The issues are:

1. Did claimant's right upper extremity injuries arise out of and in the course of her employment? If so, what is claimant's functional impairment for her right upper extremity injuries?

2. Did claimant's psychological condition, depression, arise out of and in the course of her employment? If so, what is claimant's functional impairment for her psychological condition?

3. Is claimant permanently and totally disabled?

4. Is claimant entitled to TTD benefits?

5. Is claimant entitled to future medical treatment?

6. Is respondent entitled to an offset for claimant's Social Security retirement and KPERS retirement benefits?

7. Is claimant entitled to attorney fees for her appeal to the Board?

FINDINGS OF FACT

Claimant testified at the February 28, 2012, preliminary hearing that she worked for respondent for 17 years. She injured her left wrist on July 19, 2011, when a file box weighing more than 100 pounds fell on her left hand. Claimant testified she had no physical issues outside her left hand or arm, but her pain went into her shoulder. Claimant indicated she received left wrist injections and was seen for her left wrist injury by several doctors.

Claimant testified that in the 1980s she began seeing therapists at Family Service and Guidance Center for relationship issues. Claimant sought help for anxiety and depression from her second divorce and her treatment ended after approximately one year.

In the mid-1990s, claimant saw Dr. Shimpi because of anxiety and marital issues. Claimant testified Dr. Shimpi prescribed anti-depressant medication, which claimant continued taking through the date of the February 28, 2012, preliminary hearing. Sometime between 2000 and 2005, Dr. Shimpi was killed and claimant began seeing Dr. Sheafor for medical checks. After a fourth divorce, claimant saw Dr. Sheafor in 2005 or 2006. Dr. Sheafor prescribed Xanax, an anti-anxiety medication, which claimant continues to take to help her sleep. In 2009, claimant reduced her visits with Dr. Sheafor to every six months, but continued seeing him until her left wrist injury.

In 2004, claimant saw Mary Ann Abbott, Psy.D., at New Beginnings two or three times for therapy related to a divorce. Because of a relationship problem with her daughter, claimant returned to see Dr. Abbott in August 2010. Claimant's mother died in June 2011. Claimant began having grief problems, which she reported to Dr. Abbott.

At the February 28, 2012, preliminary hearing, claimant testified her left wrist injury caused her to feel helpless and hopeless. She stated that prior to the injury she was "doing good, just generally good" emotionally.[1] Claimant testified that on November 1, 2011, she retired from her employment with respondent. She alleged her left wrist injury caused her to retire and her retirement was not voluntary. However, claimant admitted no supervisor or boss told her to retire. Claimant testified she receives Social Security retirement benefits of $1,114 per month that commenced November 1, 2011. She also testified she receives $906 or $909 per month from KPERS.

At the regular hearing, respondent denied claimant sustained a right arm or psychological injury. Claimant requested TTD from November 1, 2011, through the date claimant was declared permanently and totally disabled by Andrew H. Schauer, Ph.D., which was August 19, 2013. The parties agreed claimant's average weekly wage (AWW) prior to November 1, 2011, was $823.20, plus $62.84 for claimant's contribution to her KPERS retirement fund for a total AWW of $886.04 and that after November 1, claimant's AWW was $1,018.12. Claimant's Exhibit 1, claimant's wage statement for the pay periods ending January 22 through July 9, 2011, indicates that $134.51 to $144.39 was withheld from each two-week pay period for KPERS.

Claimant indicated that in the fall of 2014 she sustained a right shoulder injury when she used her right hand and arm to swing a 40-pound garbage bag into a trash receptacle. Normally, she would have used two hands to lift the garbage bag. She indicated her right shoulder again became painful when she lifted some luggage around Christmas 2014. Claimant underwent a right carpal tunnel release in September 2013, which she attributed to trying to do everything with her right hand.

Claimant was recommended to have left carpal tunnel surgery, but she declined because her left hand pain was totally different than her right hand pain. Claimant indicated she was told it was not a good idea to undergo a left carpal tunnel release because the surgery could make her left hand condition worse. She also felt she was emotionally unable to undergo a left carpal tunnel release.

Claimant testified she continues seeing Dr. Abbott about every two weeks and that Dr. Abbott keeps her going. Claimant indicated she is housebound, has extreme left arm pain, "some kind of nerve shaking thing"[2] and is unable to use her left arm at all.

When asked if she had taken anti-depressant medications every day since 1994 or 1995, claimant testified, "There may have been times when we lowered the dose. And that

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[1] P.H. Trans. (Feb. 28, 2012) at 21.

[2] R.H. Trans. at 16.

may have been discontinued at one point or another."[3] Claimant also confirmed that the day before her July 19, 2011, work accident, she was taking Tramadol HCL for pain, Xanax for sleeping, Wellbutrin XL and Prozac. She is currently taking Tramadol and Xanax and is using a prescription solution on her wrist.

Claimant testified the first mental health care provider she saw after her July 19, 2011, accident was Dr. Sheafor, who referred claimant to Dr. Abbott. Claimant indicated the referral was made for a "bunch of things. It was my mother and my injury"[4] and she was depressed about everything. When asked if she had already made retirement plans when she saw Dr. Sheafor on August 31, 2011, claimant testified:

> No. No. I had to -- the only reason I retired when I did was because the State was offering -- well, Number 1, because I couldn't do my job. Number 2, because the State was offering an early retirement and that they would pay my health insurance until I turned 65. So I submitted that by September 30th. I don't think I had -- maybe that was a suggestion. Maybe we talked about that.[5]

P. Brent Koprivica, M.D., hired by claimant's counsel, evaluated claimant on November 25, 2014, and was the only medical doctor who testified. Dr. Koprivica reviewed claimant's extensive medical and psychological records, took a history from claimant and physically examined her. Dr. Koprivica testified there were no indicators of untruthfulness on the part of claimant and she was consistent.

With regard to claimant's left upper extremity, Dr. Koprivica's diagnoses were sprain/strain, CRPS Type 1 and carpal tunnel syndrome. The doctor noted claimant cannot use her left hand for gripping or opening doors. She can use her left hand for support only. Dr. Koprivica indicated claimant developed left upper extremity tremors.

Dr. Koprivica indicated symptoms of CRPS include swelling and sweating of the affected body part and inappropriate temperatures or temperature changes, the extremity will get very cold, look red, have skin striation, nail changes and tremors. A person with CRPS will get allodynia, a condition where any light touch or movement can produce pain. The joints will become rigid and atrophy will develop from lack of use. According to Dr. Koprivica, psychological sequela is not uncommon because of the physical problem.

Dr. Koprivica opined claimant, for her left upper extremity, would need future medical treatment, including monitoring by an appropriate pain specialist, medications and

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[3] *Id.* at 26.

[4] *Id.* at 33.

[5] *Id.*

probably psychotherapy. Using the *Guides*,[6] Dr. Koprivica opined claimant had a 90 percent left upper extremity functional impairment. When asked about claimant's left upper extremity restrictions, Dr. Koprivica testified, "from a vocational perspective, she needs to be thought of as being one-armed only. And she's not gonna be able to use the left upper extremity, and that includes even on activities of daily living."[7] The doctor testified the severity of pain from claimant's CRPS precluded her from accessing the open labor market and he did not think she was employable.

Dr. Koprivica testified that without a left carpal tunnel release, claimant's underlying condition will not change. He testified there was validity to statements that some people who undergo surgery exacerbate their CRPS. He also testified that people with emotional sequela, because of the fears and stresses of surgery, often have poor results, no matter what is done physically.

According to Dr. Koprivica, claimant developed right carpal tunnel syndrome and a right shoulder strain or sprain. Dr. Koprivica indicated claimant's right shoulder injury was caused by trying to throw a garbage bag that was too heavy using only her right arm. He testified claimant's right carpal tunnel syndrome arose as a complication from her inability to use her left upper extremity and compensatory overuse of her right upper extremity. In his report, Dr. Koprivica indicated that as a direct and natural consequence of claimant's left upper extremity CRPS, she developed compensatory overuse on the right resulting in right carpal tunnel syndrome and suffering a right shoulder injury. Dr. Koprivica opined the prevailing factor for claimant's right upper extremity conditions was the July 2011 injury and the development of CRPS.

Dr. Koprivica indicated claimant's right carpal tunnel syndrome was present before her July 19, 2011, accident, but the overuse led to a new and progressive neurological change in her median nerve, akin to a longer tear in a rag. He did not know whether claimant's right carpal tunnel syndrome was merely aggravated because of compensatory overuse.

Dr. Koprivica assigned a 10 percent upper extremity functional impairment for claimant's right carpal tunnel syndrome and an 8 percent upper extremity functional impairment for her right shoulder, which combine for a 17 percent right upper extremity functional impairment.

Dr. Koprivica testified claimant should avoid repetitive or sustained activities above the right shoulder, overhead lifting, climbing, exposing her right upper extremity to vibration,

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[6] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[7] Koprivica Depo. at 28.

lifting and carrying more than occasionally and lifting more than 10 or 20 pounds below chest level. Dr. Koprivica did not foresee claimant needing future medical treatment for her right upper extremity.

Using the *Guides*, Dr. Koprivica indicated claimant's 90 percent left upper extremity functional impairment converted to a 54 percent whole body functional impairment. The doctor also testified claimant's 17 percent right upper extremity functional impairment converted to a 10 percent whole body functional impairment. Finally, he noted claimant's 54 percent and 10 percent ratings combine for a 59 percent whole body functional impairment that he rounded to 60 percent.

Dr. Abbott first saw claimant in 2002. When deposed in April 2015, Dr. Abbott was still providing claimant treatment in the form of therapy sessions. The longest gap in treatment by Dr. Abbott was five years and the shortest, eight months. Prior to claimant's July 19, 2011, work accident, claimant had a two-year gap in treatment with Dr. Abbott. Dr. Abbott summarized her treatment of claimant and her condition between 2002 and the July 19, 2011, accident by indicating claimant had interpersonal issues with people at work, siblings, divorce-related issues and with boyfriends. Dr. Abbott also testified that:

> . . . even though she [claimant] was experiencing depressive symptoms they would fall under more of an adjustment reaction type of depression, which did not interfere with her ability to take care of herself or to function interpersonally or change her self-perception or do her job, so she would have episodes of symptoms, treatment, psychotherapy, medication, and then she would get better.
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> She would go on, live her life, and then something would throw a curve ball at her.[8]

Dr. Abbott testified she saw claimant on September 27, 2011. Claimant saw Dr. Sheafor regarding medications on August 31, 2011. He indicated claimant's mother died in June and he referred her to Dr. Abbott for grief counseling. Dr. Abbott's note from the September 27, 2011, visit indicates claimant was grieving and there were issues between claimant, her daughters and claimant's siblings.

Claimant next saw Dr. Abbott on December 6, 2011. Dr. Abbott's note from that visit stated claimant was depressed and grieving. That same note indicated claimant did not want to retire due to her injury and they explored claimant's feelings about retirement. Dr. Abbott testified that by the December 6 visit, claimant had several medical consultations with a variety of medical providers, was diagnosed with RSD and had to retire. Claimant was concerned with her financial well-being, looked worse and had recurrent severe major depressive disorder.

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[8] Abbott Depo. at 6-7.

Dr. Abbott testified the etiology of claimant's major depression was much different than her adjustment disorder depression. "This one has a very different flavor because of the chronicity and the severity of the injury and the effect on her functioning and her occupational abilities and such."[9] She testified that depressions are qualitatively different. Adjustment disorder is less severe and is in response to an external stressor that can be relieved within six months with treatment. Claimant's major depressive disorder has qualitatively changed claimant as a person and significantly changed her functioning and is not comparable to her previous types of depression. Dr. Abbott opined claimant's accident was the prevailing factor for her recurrent severe major depressive disorder and was not an aggravation of her preexisting depression.

Dr. Abbott recommended future medical treatment for claimant's depression, specifically a six-week group program at the Lemons Center on the psychological aspects of how to deal with chronic pain and how to adjust her lifestyle. Dr. Abbott thought completing the program would decrease her need to see claimant to once a month.

Dr. Abbott indicated claimant was planning on working as long as she could. She testified it was a huge change for claimant to have to retire when she planned on working a few more years. Dr. Abbott indicated claimant complained of right shoulder pain because of having to overcompensate using her right hand and shoulder.

Andrew H. Schauer, Ph.D., employed by claimant's attorney, evaluated claimant on August 19, 2013. Dr. Schauer was asked, among other things, to provide an opinion about claimant's current diagnosis and how, if at all, it is traceable to her work injury and its sequelae. Dr. Schauer's report indicated he used several psychological procedures and tests to evaluate claimant. The doctor also reviewed several orders, medical records and the transcript of the March 27, 2012, deposition of Robert W. Barnett, Ph.D.

Dr. Schauer posed five hypotheses concerning whether claimant's psychological condition is traceable to her work injury. Dr. Schauer then went through findings favoring and not supporting each hypothesis. They are discussed at length in the Board's March 18, 2014, Order, and are incorporated herein by reference. Dr. Schauer opined in his September 2013 report that, "The ongoing pain associated with her work-related injury and subsequent limitations caused Major Depression, Recurrent, Severe without Psychotic Features."[10]

On November 30, 2013, Dr. Schauer issued another report indicating claimant's major depression, recurrent, severe left her unable to secure and maintain substantial and gainful employment. Dr. Schauer opined claimant's work accident was the prevailing factor

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[9] *Id.* at 11.

[10] Schauer Depo., Ex. 2 at 5.

for her severe depression. Dr. Schauer testified claimant's pre-accident depression was driven by life events including poor relationships and divorces. Claimant was having temporary abnormal reactions and sought treatment. Her work was not impacted. She had an adjustment disorder with depression, but should get better. Dr. Schauer thought major depressive disorder could be brought about by dysfunction and severe stress in a family, but did not believe it happened in this instance.

Claimant was seen at the request of her attorney by Robert W. Barnett, Ph.D., on January 18, 2012. Dr. Barnett is a clinical psychologist, rehabilitation counselor, rehabilitation evaluator and job placement specialist. Of the psychological evaluations Dr. Barnett performs in workers compensation cases, 100 percent are for claimants. He obtained background information from claimant, conducted a mental health examination, administered a battery of psychological tests and took a history of claimant's psychological treatment. Dr. Barnett indicated that for several years, claimant had been taking anti-depression medications Prozac and Wellbutrin, as well as Xanax for sleep only.

Dr. Barnett's report indicated that prior to claimant's left wrist injury, she was experiencing a grief reaction from her mother's death. He stated in his report that it was noteworthy that seven years had passed between when claimant was treated for the grief reaction over the death of her mother and claimant's left wrist injury. When he testified in March 2012, Dr. Barnett stated that when he prepared his report, he thought claimant's mother had passed away seven years earlier. Dr. Barnett also testified that when he evaluated claimant, she no longer had grief issues related to the death of her mother.

Dr. Barnett diagnosed claimant with dysthymic disorder, late onset, moderate. He explained dysthymic disorder is a depressive disorder, secondary to some type of loss such as a physical loss or a relationship loss. Dr. Barnett agreed that according to the DSM-IV, the essential feature of dysthymic disorder is a chronically depressed mood that occurs for most of the day, more days than not for at least two years after the loss. The DSM-IV states that persons with dysthymic disorder describe their mood as sad or "down in the dumps." The DSM-IV also states that during periods of depressed mood, at least two of the following additional symptoms are present: poor appetite or overeating, insomnia or hypersomnia, low energy or fatigue, low self-esteem, poor concentration or difficulty making decisions, and feelings of hopelessness.[11]

Dr. Barnett stated, "In my opinion, her [claimant's] predominant issue is dysphoria, secondary to her various losses, including the loss of her job and the loss of function."[12] With regard to the issue of prevailing factor, Dr. Barnett opined:

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[11] Barnett Depo. (Mar. 27, 2012), Ex. 2.

[12] Barnett Depo. (Mar. 20, 2015) at 7.

> The symptoms of depression that Ms. Jordan-Cain reported to me during the interview are consistent with the losses she has suffered since her injury. These symptoms certainly can be treated appropriately by a licensed clinical psychologist, as well as through the continued use of her antidepressant and anxiety medication. Given that she reports these symptoms as arising since her injury and various losses, I have no reason to dispute that the injury was the prevailing factor in the emergence of these symptoms, as well as the need for care.[13]

Dr. Barnett, at the request of claimant's attorney, evaluated claimant a second time on July 1, 2014. In addition to interviewing claimant, Dr. Barnett conducted psychological testing. As indicated above, when he originally evaluated claimant, Dr. Barnett diagnosed claimant with dysthymic disorder, late onset, moderate. He indicated dysthymic disorder is generally seen as secondary to a loss. He considered, but ruled out, diagnoses of adjustment disorder, depressive disorder not otherwise specified and major depressive disorder. As a result of the July 2014 evaluation, Dr. Barnett diagnosed claimant with dysthymic disorder, late onset, severe. He also diagnosed claimant with anxiety disorder, not otherwise specified, moderate due to claimant's report of anxiety symptoms. Dr. Barnett opined the prevailing factor for his diagnoses was claimant's work injury and her various losses and problems caused by her work injury. He testified that prior to her work injury, claimant had a number of difficult life events, for which she sought appropriate treatment. Dr. Barnett indicated claimant's issues were resolved with treatment.

Using the *Guides*, specifically the table entitled Classification of Impairments Due to Mental and Behavioral Disorders, Dr. Barnett placed claimant in Class 3, moderate impairment. He then used the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (2nd ed.) to determine an impairment range of 25 to 50 percent. Dr. Barnett imposed a 30 percent functional impairment. Dr. Barnett felt claimant was closer to the lower end of the range because her symptoms were not as severe as major depressive disorder, which would be closer to a 50 percent rating.

Dr. Barnett recommended claimant continue treatment with Dr. Abbott. Dr. Barnett opined it would be difficult to find appropriate employment for claimant. He also testified claimant could perform a sedentary job requiring only the use of her right hand if she had no other issues, such as depression and chronic pain. However, given claimant's chronic pain and depression, Dr. Barnett doubted she could maintain full-time employment.

Stacey A. Carter-Sand, Ph.D., at the request of respondent, evaluated claimant on July 7, 2014. Dr. Carter-Sand primarily works with chronic pain patients. She took a history from claimant, reviewed her medical records and administered several tests. Dr. Carter-Sand also spoke to Dr. Abbott about claimant's emotional state before and after her work injury and treatment recommendations. Dr. Carter-Sand diagnosed claimant with

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[13] *Id.* at 8.

major depressive disorder, recurrent, severe, without psychotic features and pain disorder associated with psychological factors and a general medical condition.

Dr. Carter-Sand wrote a letter dated July 12, 2014, concerning claimant that stated, in part, "While she does have a history of premorbid psychiatric issues, the severity of her current mood interference is [*sic*] appears to be directly tied to the work related injury and the resulting impact it has had on her ability to function on a day to day basis."[14] Dr. Carter-Sand testified what claimant is now experiencing is much more severe and in direct reaction to all of the loss and changes she had because of her work injury. Dr. Carter-Sand identified claimant's losses as a result of her work injury as her inability to keep working, difficulty maintaining relationships, change in financial status and changes in her ability to function on a daily basis.

Respondent objected to Drs. Abbott, Schauer, Carter-Sand and Barnett providing causation and/or prevailing factor opinions, because they are medical issues and require a medical opinion from a physician. Respondent also objected to Dr. Barnett providing functional impairment rating opinions because he is not a physician.

With respect to future treatment recommendations, Dr. Carter-Sand recommended claimant pursue treatment through the Lemons Center for pain management and continue psychotherapy with Dr. Abbott.

Dr. Carter-Sand acknowledged claimant had mood disorder symptoms of anxiety and depression before her work injury. Dr. Carter-Sand could not say that claimant's preexisting diagnosis was exacerbated by her pain. However, she did agree that claimant had symptoms of a mood disorder that were increased by her work injury. Dr. Carter-Sand testified she would not have diagnosed claimant with major depressive disorder prior to her work injury if claimant was functioning without significant mood impairment. Dr. Carter-Sand acknowledged that before claimant's work injury, she was not in chronic pain, was not socially isolated and was working. According to Dr. Carter-Sand, the grief from the death of a mother would not likely result in a diagnosis of major depressive disorder.

At the request of respondent, on May 13, 2015, claimant was evaluated by Patrick D. Caffrey, Ph.D., who testified he is a neuropsychologist. His doctorate is in special education. Dr. Caffrey has not completed a clinical psychology internship approved by the American Psychological Association or become board certified in neuropsychology.

Dr. Caffrey reviewed claimant's medical and psychological records, interviewed her and administered six different psychological tests. He noted claimant's current medications included Tramadol, ibuprofen, Pennsaid-Topical Ointment, Cymbalta, Wellbutrin, Trazodone and Xanax. Dr. Caffrey testified that before claimant's work accident, she had

[14] Carter-Sand Depo., Ex. 2.

taken psychotropic medications for several years. According to Dr. Caffrey, claimant's responses on some of the psychological tests indicated she was over-reporting and/or exaggerating her symptoms.

Dr. Caffrey did not know what type of depression claimant had before August 27, 2010. He later indicated that prior to claimant's July 19, 2011, work accident, she was receiving treatment for major depressive disorder. Dr. Caffrey arrived at this opinion by reviewing Dr. Abbott's notes and taking a history from claimant. Dr. Caffrey diagnosed claimant with major depressive disorder, recurrent, severe, without psychotic features; avoidant personality disorder; chronic pain due to CRPS and other non-work-related medical conditions.

Dr. Caffrey also referenced a March 19, 2007, record that indicated claimant had increased fatigue, hypersomnolence and decreased motivation. On cross-examination, Dr. Caffrey admitted he did not know how long claimant's hypersomnolence lasted and that it might matter. Dr. Caffrey also cited a May 8, 2009, record indicating claimant was depressed. He agreed the March 19, 2007, record did not indicate claimant had markedly diminished interest or pleasure most of the day, every day, which is one of the symptoms of major depressive disorder.

On cross-examination, Dr. Caffrey acknowledged that before her work accident, claimant did not admit to missing periods of work due to depression and was able to perform activities of daily living. He also agreed that before claimant's work accident, she did not have help performing her activities of daily living and now she does. Dr. Caffrey acknowledged it would have helped if he could have seen claimant before her work accident.

According to Dr. Caffrey, claimant's work accident was not the prevailing factor causing her psychological condition. He believed the prevailing factor for claimant's psychological condition was biological and could be related to deficiencies in dopamine, norepinephrine and/or serotonin, three neurotransmitter substances often associated with depression.

Because claimant's work accident was not the prevailing factor causing her psychological condition, Dr. Caffrey assigned claimant no psychological impairment. He assigned claimant no specific work restrictions from a psychological standpoint and released her to work within her physical capacity parameters. Dr. Caffrey recommended continued therapy, but indicated he was not recommending treatment for a psychological disorder as a result of her work injury.

At the request of claimant's attorney, vocational rehabilitation counselor Richard W. Santner evaluated claimant's capacity to return to substantial and gainful employment. He reviewed the records of Drs. Koprivica, Schauer, Carter-Sand and Barnett. Mr. Santner indicated claimant is 66 years of age, has a bachelor's degree in business administration

and worked for respondent for 17 years in a clerical and administrative capacity. Mr. Santner indicated he previously tried to place other persons with CRPS in employment settings. He testified that from a physical standpoint, claimant is one-armed, has significant pain to a varying degree each day and has severe depression. He also noted claimant has become increasingly isolated since her work accident and does not go out, interact or eat properly. Mr. Santner agreed claimant removed herself from the open labor market by retiring.

Mr. Santner opined that based on the information provided by Dr. Koprivica and the various psychologists:

> Any job she [claimant] could conceivably perform would need to be done with one hand. Furthermore, I believe the pain issues that have been documented from both a physical and psychological perspective would make it virtually impossible for her to obtain and retain a job that would require use of her hands or interaction with coworkers or the public in any kind of ongoing manner. On that basis I believe it is more probably true than not that Ms. Jordan-Cain is realistically unemployable.[15]

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[16] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[17]

Claimant's right upper extremity injuries arose out of and in the course of her employment, for which she is entitled to a 17 percent right upper extremity functional impairment.

Dr. Koprivica, the only medical doctor who testified, opined claimant's right carpal tunnel and right shoulder injuries were the direct and natural result of her left upper extremity CRPS. Dr. Koprivica opined claimant sustained a 17 percent right upper extremity functional impairment. The testimony and opinions of Dr. Koprivica are uncontroverted. Uncontroverted evidence which is not improbable or unreasonable will not

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[15] Santner Depo., Ex. 2 at 4.

[16] K.S.A. 2011 Supp. 44-501b(c).

[17] K.S.A. 2011 Supp. 44-508(h).

be disregarded unless it is shown to be untrustworthy.[18] Dr. Koprivica's testimony is neither improbable, unreasonable nor untrustworthy.

Respondent argues claimant merely aggravated her preexisting right carpal tunnel syndrome. Dr. Koprivica's testimony that claimant had preexisting right carpal tunnel syndrome is undisputed. However, the doctor also testified claimant's right upper extremity overuse led to a new and progressive neurological change in the median nerve. K.S.A. 2011 Supp. 44-508(f)(2) provides, in part, "An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic." There is insufficient evidence that claimant's overuse of her right upper extremity solely aggravated her preexisting right carpal tunnel syndrome.

Dr. Koprivica indicated there was a new structural change in claimant's median nerve. Work-related injuries resulting in a new physical finding, or a change in the physical structure of the body, are compensable, despite claimant also having an aggravation of a preexisting condition.[19]

Respondent asserts claimant's right shoulder injury was not the natural consequence of her left upper extremity injury. Respondent contends claimant's right shoulder injury was caused because, knowing she could not use her left upper extremity, she attempted to lift a very heavy garbage bag. According to respondent, claimant could have safely moved the garbage bag by removing some of its contents or not moved it at all. The Board disagrees.

Claimant's testimony that she lifted the garbage bag using her right arm because her left arm was essentially useless is undisputed. Dr. Koprivica indicated claimant's right shoulder injury was a direct and natural consequence of her inability to use her left upper extremity. Kansas appellate courts have consistently held that when a primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.[20]

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[18] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

[19] See *Le v. Armour Eckrich Meats*, ___ Kan. App. 2d ___, 364 P.3d 571 (2015).

[20] See *Goodell v. Tyson Fresh Meats*, 43 Kan. App. 2d 717, 235 P.3d 484 (2009); *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997) and *Reese v. Gas Engineering & Construction Co.*, 219 Kan. 536, 548 P.2d 746 (1976).

Claimant's major depressive disorder arose out of and in the course of her employment because it is directly traceable to her July 19, 2011, physical work injury. Claimant's work accident was the prevailing factor causing her major depressive disorder and she sustained a 30 percent whole person functional impairment.

K.S.A. 2011 Supp. 44-508(f)(2)(B) states:

> An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

In *Adamson*[21] and *Love*,[22] the Kansas Court of Appeals stated that in order to establish a compensable claim for traumatic neurosis, claimant must show: (1) a work-related physical injury, (2) symptoms of the traumatic neurosis and (3) that the neurosis is directly traceable to the physical injury.

Respondent objected to the causation and/or prevailing factor opinions of Drs. Barnett, Schauer, Abbott and Carter-Sand at their depositions, because they are not medical doctors. However, respondent never raised that as an issue in its submission letter to the ALJ. This issue was not raised by respondent to the ALJ, nor in respondent's brief to the Board.

K.S.A. 2011 Supp. 44-555c(a), in part, states:

> The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

The Board has frequently declined to exercise de novo review when an issue was not raised and limited review to "questions of law and fact as presented and shown by a

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[21] *Adamson v. Davis Moore Datsun, Inc.*, 19 Kan. App. 2d 301, 868 P.2d 546 (1994).

[22] *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, Syl., 771 P.2d 557, *rev. denied* 245 Kan. 784 (1989).

transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."[23] The Board will not hear this issue on appeal.

The evidence that claimant's work accident was the prevailing factor causing her major depressive disorder is overwhelming. Five psychologists testified who either treated or evaluated claimant. Drs. Abbott, Barnett and Schauer opined claimant's work accident was the prevailing factor causing her post-accident psychological condition. Four psychologists opined claimant's psychological condition dramatically changed after her accident and she suffered from a different type of depression than she did prior to her work accident. Drs. Schauer, Abbott and Carter-Sand opined claimant developed major depressive disorder, severe, recurrent, after her work accident, a condition she did not have before her accident. Dr. Barnett opined that as a result of her work accident, claimant developed dysthymic disorder, a condition she did not have previously.

The Board finds it significant that Dr. Abbott was claimant's treating psychologist and Dr. Carter-Sand was employed by respondent to evaluate claimant. The Board also notes Dr. Carter-Sand is the only psychologist who spoke to Dr. Abbott before rendering her opinions. Dr. Schauer was particularly credible, as he performed a very in-depth evaluation of claimant.

Dr. Caffrey was the lone psychologist who opined claimant's work accident was not the prevailing factor causing her major depressive disorder. Dr. Caffrey felt claimant had major depressive disorder prior to her work injury. In doing so, he interpreted Dr. Abbott's notes to mean claimant had major depressive disorder prior to her work accident. Yet, Dr. Abbott herself did not diagnose claimant with major depressive disorder prior to her accident. Nor, as pointed out above, did Drs. Barnett or Carter-Sand.

The Board adopts the 30 percent functional impairment rating for claimant's psychological condition rendered by Dr. Barnett. Respondent objects that Dr. Barnett is not a medical doctor and, therefore, is not qualified to provide an impairment rating. Although respondent objected to Dr. Barnett's impairment rating at his deposition, respondent did not raise this as an issue in its submission letter to the ALJ. For reasons set forth above, the Board will not consider this issue on appeal.

Moreover, the Board rejects respondent's specific argument that Kansas law precludes a rating from a psychologist because the *Guides* limits a rating opinion only from a physician.[24]

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[23] See K.S.A. 2011 Supp. 44-555c(a); *Byers v. Acme Foundry, Inc.*, No. 1,056,474, 2013 WL 6382905 (Kan. WCAB Nov. 21, 2013). See also *Hunn v. Montgomery Ward*, No. 104,523, 2011 WL 2555689 (Kansas Court of Appeals unpublished opinion filed June 24, 2011).

[24] See *Moody v. KBW Oil & Gas Company*, No.1,061,663, 2014 WL 1758037 (Kan. WCAB Apr. 28, 2014).

Claimant is permanently and totally disabled.

Respondent contends it was accommodating claimant's restrictions when she voluntarily retired on November 1, 2011, and removed herself from the open labor market. Claimant's testimony is undisputed that she retired because of her left wrist injury and that the retirement was not voluntary. Dr. Abbott indicated claimant was planning on working as long as she could and it was a huge change for claimant to have to retire when she planned on working a few more years.

The terms "substantial and gainful employment" are not defined in the Kansas Workers Compensation Act. However, the Kansas Court of Appeals in *Wardlow*[25] held: "The trial court's finding that Wardlow is permanently and totally disabled because he is essentially and realistically unemployable is compatible with legislative intent." The Court, in *Wardlow*, looked at all the circumstances surrounding Mr. Wardlow's condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether Mr. Wardlow was permanently and totally disabled.

Mr. Santner was the only vocational expert to evaluate claimant's capacity to return to substantial and gainful employment. He and Dr. Koprivica opined claimant is unemployable. The Board finds their opinions persuasive. The pain and work restrictions caused by claimant's physical injuries likely make her unemployable. Add to that her major depressive disorder, age, medications and work experience and there is little doubt claimant is permanently and totally disabled.

Claimant is not entitled to temporary total disability benefits.

Claimant agreed she would not pursue the issue of TTD if the Board found claimant is permanently and totally disabled. Therefore, the Board will not address this issue.

Claimant is entitled to future medical treatment for her left upper extremity injuries and major depressive disorder, but not her right upper extremity.

Claimant argues she is entitled to future medical treatment for her right upper extremity. K.S.A. 2011 Supp. 44-510h(e) provides that after the employee reaches maximum medical improvement, it is presumed that the employer's obligation to provide medical treatment shall terminate, but that such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary. Dr. Koprivica did not foresee claimant needing future medical treatment for her right upper extremity. That opinion is uncontroverted. No other medical evidence

[25] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

was presented indicating claimant will need future medical treatment for her right upper extremity. Therefore, the Board finds claimant did not prove additional medical treatment will be necessary for her right upper extremity.

Dr. Koprivica indicated claimant will need some form of pain management for her left CRPS and carpal tunnel syndrome. That opinion is also uncontroverted. Accordingly, the Board finds claimant is entitled to future medical treatment for her left upper extremity.

All five psychologists indicated claimant needs future psychological treatment. Claimant is awarded future medical treatment for her major depressive disorder.

Respondent is entitled to an offset for claimant's Social Security and KPERS retirement benefits.

K.S.A. 2011 Supp. 44-501(f) provides:

> If the employee receives, whether periodically or by lump sum, retirement benefits under the federal social security act or retirement benefits from any other retirement system, program, policy or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment. Where the employee elects to take retirement benefits in a lump sum, the lump sum payment shall be amortized at the rate of 4% per year over the employee's life expectancy to determine the weekly equivalent value of the benefits.

In her brief to the Board, claimant argues no offset for claimant's retirement benefits should be allowed because respondent failed to produce evidence as to the amount contributed by respondent. K.S.A. 2011 Supp. 44-501(f) does not require an employer to prove the amount it contributed to claimant's Social Security retirement benefits. Claimant's testimony is undisputed that commencing November 1, 2011, she receives Social Security retirement benefits of $1,114 per month, or $257.08 per week. Respondent proved an offset for Social Security retirement benefits of $257.08 per week.

The Board finds respondent is also entitled to an offset for the portion respondent contributed to claimant's KPERS retirement plan. Sufficient information is available for a fact finder to calculate the offset. Claimant testified she receives $906 or $909 per month from KPERS. Claimant indicated she retired on November 1, 2011, so the Board finds that date is the date she began receiving her monthly KPERS benefits. The Board will use a monthly figure of $906 per month, or $209.08 per week.

The parties stipulated claimant contributed $62.84 per week to claimant's KPERS retirement plan. Claimant's Exhibit 1 at the regular hearing showed respondent contributed $134.51 during 11 two-week pay periods and $144.39 for two two-week pay periods, for a total of $1,768.39. That means respondent contributed an average of $68.02 per week to claimant's KPERS retirement plan ($1,768.39 ÷ 26 weeks = $68.02 per week). When claimant's $62.84 per week and respondent's $68.02 per week contributions are combined, an average contribution of $130.86 per week was contributed to claimant's KPERS retirement plan. Thus, each week respondent contributed 52 percent and claimant 48 percent toward claimant's KPERS retirement plan ($68.02 ÷ $130.86 = 52 percent). Respondent is thus entitled to a $108.72 weekly offset for the amount it contributed to claimant's KPERS retirement plan ($209.08 per week x 52 percent = $108.72).

The Board used a similar method in *Vanorman*[26] to calculate a KPERS retirement offset. In summary, respondent is entitled to an offset of $257.08 for claimant's Social Security retirement benefits and $108.72 for KPERS for a $365.80 weekly offset.[27]

K.S.A. 2011 Supp. 44-501(f) provides that after the offset is applied, claimant's award cannot be less than an amount equal to her functional impairment. As noted above, the Board finds claimant has a 90 percent left upper extremity functional impairment that converts to a 54 percent whole body functional impairment and a 17 percent right upper extremity functional impairment that converts to a 10 percent whole body functional impairment. Those ratings combine for a 59 percent whole body functional impairment. Claimant also has a 30 percent whole person functional impairment for major depressive disorder. Using the Combined Values Chart of the *Guides*, claimant has a 71 percent whole body functional impairment.

No TTD was paid. Therefore, claimant is entitled to 294.65 weeks of permanent partial disability benefits based upon her functional impairment (415 weeks x 71 percent

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[26] *Vanorman v. U.S.D. 259*, No. 1,047,667, 2014 WL 6863027 (Kan. WCAB Nov. 26, 2014).

[27] The dissent's citation to *Bohanan v. U.S.D. No. 260,* 24 Kan. App. 2d 362, 947 P.2d 440 (1997) is inapplicable. *Bohanan* involved a respondent completely failing to prove the percentage of KPERS benefits it provided. The Board's decision in *Bohanan* concluded that since there was "no information in the record to indicate what percentage of claimant's KPERS benefits were provided by the employer, no offset can be allowed for this benefit." *Bohanan v. USD 260*, No. 190,281, 1995 WL 715312 (Kan. WCAB Nov. 14, 1995), *aff'd*, *Bohanan v. U.S.D. No. 260,* 24 Kan. App. 2d 362, 947 P.2d 440 (1997). Here, the evidence is the respondent contributed 52 percent, so a comparison to *Bohanan*, where there was an absolute dearth of evidence, is unconvincing.

The paragraph numbered 2 of the dissent relies on "factors" that may impact the KPERS contributions of claimant and respondent, but such "factors" are wholly outside the evidentiary record. The observation in the paragraph numbered 3 that claimant received $906 or $909 per month from KPERS and such figure is thus unknown borders on an apparent need for evidentiary certainty, as opposed to the more probable than not standard used in workers compensation litigation. Whether the $906 figure is net or gross or after taxes simply does not matter based on the statutory language in K.S.A. 2011 Supp. 44-501(f).

= 294.65 weeks). Claimant's benefit rate is $555 per week, which results in an award of $163,530.75. However, K.S.A. 2011 Supp. 44-510f(a)(3) limits an award for permanent partial disability benefits to $130,000. Immediately after July 19, 2011, claimant is entitled to receive $555 per week until $130,000 is paid.

The calculation of claimant's award does not end there. Claimant is permanently and totally disabled and under K.S.A. 2011 Supp. 44-510f(a)(1) is entitled to a maximum of $155,000, or an additional $25,000. Under the calculation method established by the Kansas Supreme Court in *McIntosh*,[28] claimant is entitled to $189.20 per week ($555 - $365.80 offset = $189.20) until the additional $25,000 is paid.

Claimant is not entitled to attorney fees for her appeal to the Board.

The Kansas Court of Appeals recently granted motions for attorney fees in two workers compensation cases appealed to the Board and then to the Kansas Court of Appeals. As noted in claimant's brief, the Kansas Court of Appeals in *Wimp*[29] granted Mr. Wimp's motion for attorney fees, citing Kansas Supreme Court Rule 7.07(b). Attorney fees were not an issue addressed in the Kansas Court of Appeals opinion, but were granted in a separate order. Respondent has filed a petition for review to the Kansas Supreme Court, so *Wimp* is not persuasive authority.

In *Karr*,[30] an unpublished opinion filed on December 11, 2015, a panel of the Kansas Court of Appeals granted Mr. Karr's motion for attorney fees for his appeal to the Board, citing K.S.A. 77-622(c) and Kansas Supreme Court Rule 7.07(b)(1). Respondent has filed a petition for review to the Kansas Supreme Court, so *Karr* is not persuasive authority.

One week later, on December 18, 2015, another panel of the Kansas Court of Appeals in *Rogers*[31] ruled that Kansas Supreme Court Rule 7.07(b) does not give appellate courts authority to award attorney fees in workers compensation cases since the Workers Compensation Board is not a district court. *Rogers* is a published opinion and, therefore, carries more weight than *Wimp* and *Karr*. Therefore, the Board denies claimant's request for attorney fees.

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[28] *McIntosh v. Sedgwick County*, 282 Kan. 636, 147 P.3d 869 (2006).

[29] *Wimp v. American Highway Technology*, 51 Kan. App. 2d 1073, 360 P.3d 1100 (2015), *pet. for rev.* filed Nov. 19, 2015.

[30] *Karr v. Mid Central Contractors*, No. 113,744, 2015 WL 8591327 (Kansas Court of Appeals unpublished opinion filed Dec. 11, 2015), *pet. for rev.* filed Jan. 7, 2016.

[31] *Rogers v. ALT-A&M JV LLC*, ___ Kan. App. 2d ___, 364 P.3d 1206 (2015).

CONCLUSIONS

1. Claimant's bilateral upper extremity injuries and major depressive disorder arose out of and in the course of her employment.

2. Claimant has a 71 percent whole person functional impairment.

3. Claimant is entitled to future medical treatment for her left upper extremity and major depressive disorder, but not her right upper extremity.

4. Claimant is permanently and totally disabled.

5. Respondent is entitled to an offset for claimant's Social Security retirement benefits and for the portion respondent contributed to claimant's KPERS retirement plan.

6. Claimant is not entitled to temporary total disability benefits or attorney fees.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[32] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the September 10, 2015, Award entered by ALJ Sanders as follows:

The claimant is entitled to 234.23 weeks of permanent partial disability compensation at the rate of $555 per week or $130,000, for a 71 percent whole person functional impairment, followed by $189.20 per week in permanent total disability compensation until an additional $25,000 is paid, for a total award of $155,000 for a permanent total disability.

As of March 15, 2016, there would be due and owing to the claimant 234.23 weeks of permanent partial disability compensation at the rate of $555 per week in the sum of $130,000, plus 8.77 weeks of permanent total disability compensation at the rate of $189.20 per week in the sum of $1,659.28, for a total due and owing of $131,659.28, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $23,340.72 shall be paid at the rate of $189.20 per week until fully paid or until further order from the Director.

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[32] K.S.A. 2014 Supp. 44-555c(j).

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Members dissent from the majority on the issue of granting respondent an offset of 52 percent of claimant's weekly KPERS retirement benefits. Respondent failed to place sufficient evidence in the record showing its contribution to claimant's KPERS retirement plan.

The majority relies on two figures that are a snapshot in time of claimant and respondent's respective contributions to claimant's KPERS retirement fund. The majority uses $62.84 per week as claimant's contribution to her KPERS retirement fund. That is based upon claimant and respondent's agreement that claimant's AWW prior to November 1, 2011, was $823.20 plus $62.84 for claimant's contribution to her KPERS retirement fund for a total AWW of $886.04 and that after November 1, claimant's AWW was $1,018.12.

The majority then calculates respondent's weekly contribution to claimant's KPERS retirement fund by averaging respondent's weekly contributions for a 26-week period from early January 2011 through July 9, 2011. Claimant was paid every two weeks. During eleven of those two-week pay periods, respondent contributed $134.51 and in the other two two-week pay periods, respondent contributed $144.39. The majority then averages respondent's weekly contributions during the aforementioned 26-week period for a $68.02 weekly contribution. The majority then calculates respondent contributed 52 percent of claimant's KPERS retirement benefits.

There are several problems with this methodology:

1. The majority is calculating respondent's contribution using a 26-week period that does not include October 31, 2011, the day before she retired. The majority is using a single 26-week period as a snapshot of respondent's contributions to claimant's KPERS retirement plan during her 17-year employment. In essence, the majority is comparing apples and oranges. They are using $906 per month to calculate the weekly amount of claimant's KPERS contributions. In fact, there is nothing in the record to indicate when claimant began receiving her KPERS retirement benefits.

2. The majority's calculation that respondent contributed 52 percent of the money that went into claimant's KPERS plan does not necessarily mean 52 percent of her weekly benefits are attributable to respondent's contribution. Factors other than the amounts contributed by claimant and respondent affect the weekly KPERS benefits claimant began receiving presumably on November 1, 2011. Some of those factors include the number of years she worked for respondent, whether her weekly benefits were reduced because she retired early, the dividends and interest earned by KPERS as a whole, etc.

3. The majority's calculation is based upon claimant's testimony that she receives $906 or $909 per month from KPERS. It is unknown if either is a correct figure. It is unknown if $906 is a gross or net amount claimant receives each month. Is $906 a net figure after taxes or other amounts were withheld from claimant's monthly retirement payments? As pointed out above, there is nothing in the record indicating when claimant began receiving her monthly KPERS retirement benefits.

4. No evidence was presented establishing the total value of claimant's KPERS retirement plan. K.S.A. 2011 Supp. 44-501(f) provides claimant's weekly workers compensation benefits shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee. No evidence was presented concerning the total amount of claimant's KPERS retirement benefits, only that she receives $906 or $909 per month, gross or net.

5. The majority decision ignores *Bohanan*,[33] wherein U.S.D. No. 260 requested an offset for Ms. Bohanan's KPERS benefits. Ms. Bohanan worked for U.S.D. No. 260 for 25 years when she was injured. Like claimant in the present matter, Ms. Bohanan retired early. The Kansas Court of Appeals denied the employer's request for an offset, stating:

> The Board's decision to *not* allow an offset for Bohanan's KPERS benefits is equally correct. In its order, the Board stated the district would be entitled to an

[33] *Bohanan v. U.S.D. No. 260,* 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

> offset if it could produce evidence of what percentage of Bohanan's KPERS benefits were provided by the district. The Board's holding should not be disturbed since there is no evidence in the record to indicate that amount.[34]

The dissent notes it is respondent's burden to prove an offset should be granted for the amount respondent contributed to claimant's KPERS retirement plan. Only respondent has information concerning the percentage it contributed to claimant's KPERS retirement fund. Yet, respondent produced insufficient evidence of the percentage of the contributions to claimant's KPERS retirement plan and the amount of claimant's total KPERS benefit attributable to her contribution. The only evidence presented was the dollar amount respondent contributed to claimant's KPERS retirement fund over a 26-week period. Respondent, in its submission letter to the ALJ, offered no calculation of its requested offset. Why? Because even respondent cannot calculate the KPERS retirement offset, given the evidence in the record.

BOARD MEMBER

BOARD MEMBER

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Honorable Rebecca A. Sanders, Administrative Law Judge

[34] *Id.* at 373.